HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE
AND
HON'BLE SHRI JUSTICE C.V.NAGARNUNA REDDY

WRIT PETITION No. 23259 OF 2006

Between:

Indullahshah Graveyard Managing Committee,
Hyderabad.

… Petitioner

AND

State Government of Andhra Pradesh,
Rep., by its Principal Secretary,
Municipal Administration and Urban Development
Department, Hyderabad & others.

… Respondents

:: O R D E R ::

Counsel for the petitioner : Shri P. Vinod Kumar

Counsel for respondent Nos.1 & 3 : Government Pleader for Municipal Administration

Counsel for respondent No.2 : Smt. Kamala Ekbote

Counsel for respondent No.4 : Shri Mohammed Ali

Dated: 27.04.2007

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Per C.V.Nagarjuna Reddy, J

In this petition filed as a piece of public interest litigation, Indullahshah Graveyard Managing Committee (for short, 'the managing committee') has prayed for issue of a mandamus to respondent Nos.1 to 3 to stop construction works undertaken by respondent No.4. The petitioner has further prayed for issue of a direction to the respondents to take necessary steps for restoration of original public passage between Gandhi Medical College (old) and M/s. Nagarjuna Travels and Hotels Private Limited as per Town Survey Plan record to an extent of 19.4 feet width and 106' feet length leading into Chandranagar Slum and Indullahshah Graveyard.

In the affidavit filed by him, Shri Niamatullah Shareef, President of the petitioner averred that there is a public passage between Gandhi Medical College (old) and respondent No.4; that the said passage is being used by the people belonging to his community for going to Indullahshah Graveyard for paying homage and making prayers for their deceased ancestors; that people belonging to more than 20 colonies visit the said place every day; that the passage is also used as an approach road to Chandranagar slum dwellers to reach Basheerbagh main road. It has also been averred that due to the illegal construction undertaken by respondent No.4, the public passage is getting damaged and there is a risk of its collapse. According to Niamatullah Shareef, the disputed construction is in total

violation of the rules framed by the Municipal Corporation of Hyderabad and the same will adversely affect the rights of the people of the area. Still further, the deponent has averred that Municipal Corporation of Hyderabad (for short 'MCH') granted building permission to respondent No.4 vide permit No.02/14 dated 29.11.2003 to an extent of more than 1000 sq. mtr., of land without NOC from the Joint Collector.

On 10.11.2006, this Court, while issuing notice, restrained respondent No.4 from continuing further construction on the premises bearing Municipal Nos.3-6-356 and 3-6-358 situated at Basheerbagh main road, Hyderabad.

In response to the notice issued by the Court, respondent Nos.2, 3 and 4 have filed separate counter-affidavits. Shri V. Narender Rao, Additional Chief City Planner of Municipal Corporation of Hyderabad has filed counter-affidavit on behalf of respondent No.2. In paragraph 3 of his affidavit, Shri Narender Rao has averred that respondent No.2 granted permission to respondent No.4 for construction of building consisting of sub-cellar, cellar + 5 upper floors for commercial complex vide permit No.62/14 dated 29.11.2003 on the site admeasuring 1323 sq. mts., and, as per the permission, the respondent No.4 was to commence construction within a period of one year and complete the same within a period of three years; that on receipt of the complaint from the petitioner, respondent No.2 came to know that respondent No.4 excavated the cellar portion without issuing commencement notice; that during the inspection it was noticed that part of passage is affected in the process of excavation of the cellar and, therefore, a notice was issued to respondent No.4 asking him to stop further construction. Shri Rao has further averred that as per the sanctioned plan, the cellar floor is permitted with 1.5 metre set back in the front

and rare sides, without leaving any set back on the southern side and with a set back of 5.70 metres on the northern side. Shri Narender Rao has averred that in response to the notices issued by respondent No.2, respondent No.4 submitted letter dated 26.07.2007 stating therein that the work was started after issuing commencement notice dated 30.9.2004. According to Shri Rao, excavation of cellar along with the property line has caused some damage to the existing passage.

Sri B. Krupakar, Mandal Revenue Officer, Nampally Mandal has filed counter-affidavit on behalf of respondent No.3. In paragraph 2 of the affidavit, the deponent has stated that there is a passage in existence, which leads to Chandranagar slum; that as per TSLR, the said passage falls in T.S.No.1, Block-E, Ward-54; that as per the record of measurement, the width of the passage is 29 links i.e., 19.33 sq. feet. In paragraph 3, he has averred that respondent No.4 excavated the land in T.S.No.2/2, Block-E, Ward-54 of Nampally Village; that the total extent of TSLR is 1096 sq. mts., and that as per the entries in TSLR, in column No.10 the name of Sri Narasimha Reddy is recorded and in column No.20 the name of Roop Karan is recorded. In paragraph 5 of the affidavit, Shri B. Krupakar has averred that a joint inspection of the site was conducted by Mandal Revenue Officer, Nampally and ACP Circle-III, MCH on 22.02.2006.

On behalf of respondent No.4, Shri E. Venkatram Reddy, Director of the company has filed affidavit. He has denied the allegation of encroachment on the public passage. According to Shri Reddy, respondent No.2 granted building permission for construction of a commercial complex on the site admeasuring 1323 sq. mts., situated in T.S.Nos.2/1 and 2/2, Block-E, Ward-54 of Nampally Village and Mandal situated at Basheerbagh main road, Hyderabad,

comprising sub-cellar, cellar + 5 upper floors vide permit No.62/14; that as the land is rocky in nature, excavation work was done manually, which took about nine months time; that the alleged site inspection by the Chief City Planner and Mandal Revenue Officer was done without notice to respondent No.4; that as a matter of fact there is no public passage at the place as alleged in the writ petition. Along with his counter-affidavit, Shri E. Venkatram Reddy has filed sketch and photographs to show the existence of 15 feet wide passage leading to the graveyard from Dr. Farooq Ali lane next to Skyline Theatre and averred that the lane, which is shown as public passage, is the land which respondent No.4 left for its convenience to run Hotel Nagarjuna; that the said hotel was closed few years back and as the building became old they decided to demolish the same and construct a new building and that they never objected general public for using the passage at any point of time. Shri Venkatram Reddy has further averred that the passage left by respondent No.4 is 8 feet wide. According to Shri Reddy, respondent No.4 is constructing the commercial complex strictly in accordance with the permit dated 29.11.2003 granted by respondent No.2. In an additional affidavit filed by him, Shri E. Venkatram Reddy has averred that there is no public passage between Gandhi Medical College (old) and the property belonging to respondent No.4 and that the existing passage at that place is only a private passage carved out from out of the property of respondent No.4 about four decades ago for ingress and egress of the persons belonging to respondent No.4 and visitors and customers of its hotel. Along with the affidavit, the deponent has filed photographs to show that the width of the said passage was only 8 feet and not 19.33 feet as claimed by the petitioner.

On 29.3.2007, the Court, after taking note of the opposing stands

taken by the parties, directed District Collector, Hyderabad to depute an officer of the rank of Revenue Divisional Officer to inspect the site on 16.04.2007 and submit his report with reference to the official records. Accordingly, Revenue Divisional Officer, Hyderabad carried out the inspection and submitted report dated 18.4.2007. It is *inter alia* mentioned in the report that the entire passage to the graveyard from Basheerbagh main road falls in T.S.No.1, Block-E, Ward-54 of Gaganmahal Village; that on the northern side of the passage the wall of old Gandhi Medical College is existing and on the southern side T.S.No.2/1, 2/2, 3/2, Block-E, Ward-54 of Gaganmahal Village are existing. The Revenue Divisional Officer has also filed a map wherein the location of the lands situated in T.S.No.1, 2/1, 2/2, 3/2 and alleged encroachment in T.S.No.1 is shown.

We have heard Sri P. Vinod Kumar, learned counsel for the petitioner, Smt. Kalpana Ekbote, learned Standing Counsel for respondent No.2, Government Pleader for Municipal Administration for respondent Nos.1 and 3 and Sri Mahmood Ali for respondent No.4 and minutely examined the records.

From the respective pleadings of the parties, the following issues arise for consideration:

1. Whether the lane existing between the Gandhi Medical College and the premises of respondent No.4 is a public lane or a private lane?
2. Whether the width of the passage is 19.33 feet or 8 feet?
3. Whether respondent No.4 has been carrying out the work of excavation on a part of the public passage?

The affidavit filed by the Mandal Revenue Officer shows that respondent No.4 has excavated land in T.S.No.2/2, Block-E, Ward-54

and its width is 19.33 sq. feet. The report of the Revenue Divisional Officer also makes a mention of the same survey number. It is, thus, evident that the survey numbers over which respondent No.4 has been carrying on construction activity and the survey number in which the passage is in existence are different and distinct from each other. The petitioner has not produced any evidence to contradict the affidavit of the Mandal Revenue Officer and the report of the Revenue Divisional Officer. Therefore, we do not see any justification to record a finding that respondent No.4 is raising construction in the land earmarked as public passage.

The question whether T.S.No.1 on which the passage exists is adjoining T.S.No.2/2 and whether respondent No.4 has encroached into T.S.No.1 is a seriously disputed question of fact, which cannot be decided by this Court in exercise of power under Article 226 of the Constitution of India and the only appropriate remedy available to the petitioner is to approach the Civil Court and establish its claim that the passage in question is a public passage and that respondent No.4 has encroached over it.

With the above observations, the writ petition is dismissed. However, liberty is given to the petitioner to approach the competent Civil Court to seek the relief claimed in this writ petition.

As a sequel to dismissal of the writ petition, WPMP.No.29624 of 2006 filed by the petitioner for interim relief is disposed of as infructuous and the interim order is vacated.

C.V.NNAGARJUNA REDDY, J

G.S.SINGHVI, CJ

Date: 27.04.2007
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